

Kandel (Migration) [2024] AATA 160 (30 January 2024)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Tosil Kandel
VISA APPLICANT:	Ms Isha Gurung
REPRESENTATIVE:	Mrs Cathryn Williams (MARN: 1170729)
CASE NUMBER:	1913621
DIBP REFERENCE(S):	BCC2018/5678181
MEMBER:	Namoi Dougall
DATE:	30 January 2024
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl 309.211(2) of Schedule 2 to the Regulations • cl 309.221(2) of Schedule 2 to the Regulations; and • reg 2.03A

Statement made on 30 January 2024 at 2:43pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – genuine and continuing spousal relationship – sponsor’s visits to Nepal – Australian divorce was not recognised in Nepal – different registered marriage dates – validly married – money transfers – shared domestic chores – supporting statements from work friends and the applicant’s family – continuous communication – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5, 65

Migration Regulations 1994, Schedule 2, cls 309.211, 309.221; rr 1.09, 1.15, 2.03

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 23 May 2019 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s 65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 17 December 2018 on the basis of her relationship with her sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211(2) because the delegate was not satisfied on the evidence that there was a genuine and continuing relationship.
4. The review applicant, Mr Tosil Kandel (the sponsor) appeared before the Tribunal on 18 January 2024 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant, Ms Isha Gurung (the applicant). The Tribunal hearing was conducted with the assistance of an interpreter in the Nepalese and English languages.
5. The review applicant was represented in relation to the review.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the applicant is a spouse, as defined by the Act, of her sponsor, Mr Tosil Kandel (the sponsor). The applicant and sponsor are collectively referred to in this decision as 'the parties'.
8. **The applicants' background and migration history**
9. On 28 January 2009, the sponsor first entered Australia on a Subclass 572 visa granted on 19 November 2008. The sponsor was granted additional student visas and then on 2 September 2013 he was granted a Subclass 457 visa which valid until 18 May 2016. The sponsor was granted a Subclass 186 visa on 18 May 2016.
10. The sponsor is a Nepalese national born in 1987. The sponsor has his mother, sister and brother still residing in Nepal. The sponsor was previously married to Sima Kandel Sapkota on 24 January 2003 and there is a child, Sarthak Kandel. The visa application stated that their marriage ended on 29 May 2016. There are two different divorce dates on two separate documents which are discussed in detail below.
11. **Hearing – sponsor's evidence**

12. At the hearing the applicant stated he married his first spouse in Nepal. They immigrated together and his son was born in Australia. The sponsor has not been in contact with his former spouse, but he believes they live in Sydney.

13. Initial meeting and development of their relationship

14. Evidence provided to the Department

15. The visa application and the sponsorship for a partner to migrate to Australia form (the sponsorship form) indicated that the parties first met on 7 June 2016 at the D'Mama Restaurant, and they were married on 1 July 2018 by Prem Prasad Sharma at Nawalparasi Chitwan.
16. The visa application stated in relation to 'Give details of the development of the relationship between the applicant and the sponsor' that 'documents attached later on'.
17. As referred to below the sponsor was out of Australia from 29 May 2016 to 21 August 2016, the period during which the parties stated that they met, and from 26 June 2018 to 25 July 2018, the period during which the parties stated that they married. Provided to the Department were travel documents for the sponsors 2018 trip to Nepal.

18. Evidence provided to the Tribunal

19. On 8 November 2023, in response to the Tribunal's letter as to information on the Department's file which is subject to a s.375A Certificate and which is discussed in more detail below, the applicant and the sponsor provided undated and unsigned relationship statements in English.
20. A summary of what the parties stated in their relationship statements as to the development of their relationship is set out below. At the hearing the Tribunal explained to the applicant that her statement was provided to the Tribunal and was undated and unsigned and in English. The applicant stated that she wrote it in Nepalese and got it translated and sent it. The Tribunal referred to the statement being in similar form and terms as the sponsor's statement and that it has not been translated as there is no certification of a translator. The applicant confirmed that she prepared the relationship statement in Nepalese and then it was translated with the help of her sister.
21. After the hearing the Tribunal was provided with both parties relationship statements but they were signed and dated
22. A summary of what the sponsor stated in his relationship statement is in italics below and what the applicant stated, if it differs or is in addition to what the sponsor stated, is in the dot points.

23. *The sponsor first met the applicant on 7 June 2018 at his friend's birthday party at the D'Mama restaurant and bar. They were introduced by their mutual friend, Pradip. After which he approached to speak with her. They had a brief conversation and exchanged phone numbers.*

- The applicant first met the sponsor on 7 June 2018 when she was with friends at the D'Mama restaurant and bar in Narayangarh. She was surprised when the sponsor approached her and spoke with her about herself. They exchanged numbers.

24. *After they first time they met they stayed in touch through phone calls, messages and Facebook. They started to see each other every day.*

- The next day they started chatting on Facebook and message and when they got to know each other they started to also use Viber. The sponsor waited for her to finish her beautician training classes and they would have a coffee. The parties live in the same town and could meet every day. The applicant lived with her parents and her uncle's daughter, Susma in Narayangarh.

25. *They decided to go for a short trip before he returned to Australia and chose Pokhara where they visited local places and she introduced him to some relatives.*

- The visited Pokhara for a trip and while there visited Begnas Lake, Sarankot, Fewa Lake and some of her relatives.

26. *The sponsor did not tell his family about the trip when they returned to Chitwan. However, when his family found out about the trip some of his relatives and family members made a plan against him when they knew he was in touch with the applicant. His family still believe in the caste system and that they are of a superior caste to that of the applicant. His family thought that if the parties are living together are spouses it would lower the family's social values and dignity.*

27. *His family put him into a rehabilitation centre to break the parties' friendship and closeness. They did not tell him anything and he is a simple person who has never been addicted to any kind of drug. When he knew he was in rehab he could not control himself, he cried and told them to let him out as he is not on drugs. He had a lot of physical and mental torture when he was there. He asked to see his family, but he was not allowed to meet anyone. He was beaten every day.*

- When they returned the sponsor's family put him into a rehabilitation centre which was planned so they would not contact each other for a month. She did not know about this at first but now knows he was there for 41 days.

28. *After 41 days he escaped and hid from those that were chasing him in the jungle. After a few hours he came out and went to the applicant's family home. He met her parents and tried to convince them that he was who he said he was but they did not believe him as they had never met him before and he looked like a madman. Further, he was in the same clothes as when he went into the rehab and had lost 15 kilos.*

29. *Unfortunately, the applicant was not at home, so he convinced her parents to let him speak with her on the phone. She was convinced it was him and she convinced her parents.*

- When the sponsor came out of the centre, he went to her home, but she was not there, but she spoke to him then her parents. She told her parents about the sponsor and asked them to keep him as his family might put him in rehab again.

30. *The applicant and her parents agreed that the sponsor should go to Pokhara where she met him and was shocked at his physical and mental*

condition as he had been tortured in rehab, they stayed for 3 weeks in Pokhara where she looked after him.

- Later the applicant and her parents decided that he should not stay in Chitwan as his family might find him. They sent him to Pokhara at night where the applicant was staying. They stayed there for 3 weeks in the applicant's bedroom.

31. *The applicant looked after him cooking food and motivating him. When he got the applicant's love, care and support he felt she was the right person who will always be there with him.*

- They stayed in one bedroom in Pokhara and during their stay the sponsor got stronger and they got closer and started to love each other.

32. *The sponsor decided to spend the rest of his life with the applicant and told her of his feelings and proposed.*

- The sponsor proposed when they were sitting in their bedroom and the applicant accepted.

33. *When the sponsor was fully recovered, he decided to return to Australia but promised to return to marry the applicant. They decided to tell her parents so they met with her parents and told them about their relationship, his previous marriage and his son. He also told them that the marriage had broken up and he did not live with them anymore. His family were not happy about his decision in relation to his previous marriage and this is why they sent him to rehab. Her parents told him they did not care about his past, he is part of the family, and they just wanted the parties to be happy.*

34. *The applicant's parent told him not to worry about what his family had done as he is their family now. After that day he forgot he had a family as they were his family. He does not need to tell the applicant and her parents about his family as they are from the same town and the applicant's parents already know about this family and what they did and they know he had left his family and accepted them as his family.*

- He 'scheduled to return to Australia on 19th August 2016 then we decided that we will tell them about our relationship to [the applicant's] family". They met the applicant's parents and told them clearly about everything about their love and commitment to each other. Her parents stated that if they are both happy, then they are also happy. The sponsor then told them about his previous marriage and child and that their relationship had broken up and he was not living with them anymore. Her parents told him they do not care about his past.

- After his return they communicated by text and video chat frequently on Skype, WhatsApp and Viber. They spoke everyday as part of their routine.

35. *It was very hard for the applicant to get a holiday, but he finally returned to Nepal on 26 June 2018. He stayed at the applicant's family home for the whole time he was in Nepal. During his stay in Nepal they decided to marry. He had a meeting with her parents and decided to marry in a Hindu temple.*

- After two years they decided to get married, and the sponsor booked his trip for 26 June 2018. They were happy to see each other and spent more time together from the first day as the sponsor stayed at her home to prevent his family planning against him. The parties stayed in the applicant's bedroom during his stay.

36. *The sponsor stated that after they married, he stayed in her bedroom.*

- They married on 1 July 2018 at the nearest Hindu temple, Harihar Mandri. Only her father attended the wedding as her mother was ill.
- A week later they went to the district administration office to apply for their marriage certificate. After one week's processing they were issued with their marriage certificate on 19 July 2018.

37. *The sponsor stated that they did not go out as they were scared of what his family would do.*

- They spent the rest of the sponsor holiday at the applicant's home.

38. **Hearing – sponsor's evidence**

39. At the hearing the sponsor stated he visited Nepal in 2016 to attend his cousin's wedding which was over the first couple of weeks. He stayed with his family in Chitwan.
40. The Tribunal asked the sponsor about his first meeting with the applicant and why he was at the restaurant. He stated that he went to the restaurant D'Mama as it was his friend, Pradip Kharel's birthday. There were a few friends around 10, most were from overseas including Pradip. He did not know he was going to be there. They are neighbours. The applicant was in the restaurant at a different table with three friends. They were celebrating and she was introduced to him by Pradip. He introduced them as they are all from the same village. He had seen her before but had not spoken with her. After further questioning the sponsor stated that the applicant had been invited to his birthday celebrations by Pradip and Pradip was introducing everyone.
41. At first the sponsor just said hello but after a few hours they had a chat for 5 to 10 minutes. He asked her to be Facebook friends and they exchanged numbers. He contacted her the next day. His relationship with his former spouse was not going well. Since 2014 and 2015 he argued with his former spouse that is why he went to Nepal by himself. When he met with the applicant, he felt he wanted to start a friendship so that is why he rang her. The applicant confirmed that he was still married but their relationship had not been healthy for 2 years. The applicant confirmed that he was still living with his former spouse and his son had been born on 10 March 2016.
42. After he called her the next day, he approached it as if they were friends, as they came from the same area and went to the same school but he had not noticed her as she was junior to him. He knew her family as her parents had a shop in the same area.
43. They chatted for a few days, 2 to 3 days, and then he asked her for a coffee. They went to a coffee shop Malewa Café and had a general conversation. From then they chatted frequently. They went again to the same coffee shop 2 to 3 days later. During their conversation the applicant told him that she was training to be a beautician so after the second time they met for coffee, he would hang around the area with his friends. Once she finished her training they would chat. As well as meeting her after

training they also went to the coffee shop every 2 to 3 days. They did not meet up after her training every day it was every 2 to 3 days. Sometimes they went to the coffee shop after her training but sometimes she had things to do at home.

44. After that his holiday was nearly finished and he only had one week before he had to return to Australia. He asked her to go him visit somewhere else. They went to Pokhara which is 3 hours in a bus from Chitwan. He suggested Pokhara as it is a tourist area with lots of places to visit.
45. They stayed there for 2 days and they visited a few places in Pokhara including Few Lake, Begnas Lake and they went to Saran Court. They went out for dinner. They stayed in a hotel in Bagnas Lake which he thinks was the Bagnas Hotel. They stayed in different rooms as before they got married it is their cultural not to stay in the same room.
46. After that he returned to Chitwan and then returned to Australia. The Tribunal asked when he separated from his former spouse. The sponsor stated it was not going very well since 2014 so he decided that it was better that they sperate. He filed for the divorce, and she was invited to attend the court but did not. The Tribunal asked again when did they sperate and the sponsor said he thinks it was in 2016 but he cannot remember which month. They separated after he got back from Nepal. After further questioning the sponsor stated that he did not return to his former spouse but went to the Central Coast. The applicant then stated that in August or September 2016 he moved to the Central Coast and after he started to live by himself for more than a year he spoke with a solicitor.
47. When he was in Nepal he had his friendship with the applicant and his neighbours or relatives knew about it. They passed this information to his family, and his family was not happy with his friendship. When he was in Sydney, his family members were not happy about the difficulties he was having with his former spouse. They suspect that as he did not have a good relationship with his spouse, and they knew that he had a friendship with the applicant and were concerned that he would go further with her. His family members including his aunties and uncles suggested that as they a Brahmin and she is Gurung, their castes do not match. If he was with the applicant, they would not accept it. The family knew there were problems with his marriage before his son was born and they kept pushing him to stay with his former spouse. The family meeting was after he returned from Pokhara.
48. From the start of the meeting his family planned to do something with him. He was chatting with his family when 4 or 5 men walked into his home, grabbed him and put him into a van and took him to another place. His family asked the men who they were but did not try to stop them. The sponsor asked the men where they were taking him but they did not answer. They took him about 20 minutes from his home. When he was taken into a house, he realised it was a rehabilitation centre as he was taken to the office where a man questioned him. The sponsor stated that he was taken to the Sunaulo Bihani Rehabilitation Centre.
49. The sponsor questioned the man at the rehabilitation centre about why he was there as he had not taken any drugs and he asked to be released. He was not listened to and the man did not tell him that it was his family who had planned to take him. The man said that he had been going against his family's decisions. After a few days the man told him that it was the applicant who contacted them and arranged for him to go to the rehabilitation centre and he felt that this was not true.

50. The sponsor stated that he was in the rehabilitation centre for 41 days and he was subject to physical and mental torture every day. He knew it was 41 days as he knew the day he was taken but he cannot remember that date now. After further questioning the sponsor stated that he cannot remember but thinks it was August and it was in 2016.
51. The sponsor stated that he escaped at night on the 41st day. When he was leaving there was a guard who let him out for a smoke but within 3 minutes, they knew he had escaped so he kept running. He noticed he was being followed so he kept running until he saw the jungle on the side of the road. He decided to run into the jungle and the people who were chasing him did not follow. He believes he stayed in the middle of the jungle for 3 hours until around 2:00 am. After he left the jungle, he kept walking to the home of the applicant's parents. It took him about 3 hours to walk there. He asked people on the street for directions, and he got to the applicant's home around 5:00 or 6:00 am.
52. The sponsor knew where her family home was, but he had never been inside her home. He knocked on the gate and shouted out if there was someone inside and her father walked out and asked him who he was. He introduced himself but they did not recognise him because he was wearing the same clothes for 41 days and he lost 15 kilos. The applicant's parents had not met him, but they knew about his family background.
53. The sponsor asked if the applicant was home and when he found she was not he asked to speak with her. Her parents called her, and they gave him the phone. When he spoke with the applicant, she knew it was him and she gave his details to her parents.
54. The sponsor stated that the applicant was in Pokhara to stay with a close friend in the home of that friend's mother. The applicant spoke with her parents and decided that he should go to Pokhara. If he stayed at her family's home, his family would find him. When asked why he did not return to Australia the sponsor stated that they took everything and he did not have his passport or his phone. The son of family where the applicant was staying came from Pokhara on a motorbike and took him back there.
55. While in Pokhara, the sponsor stayed with the son, Akash and his spouse in Akash's mother in law's home. The applicant stayed with Akash's family home. The sponsor remained in this home for one week and then the applicant then found a place they could rent, and they moved to the rental property and stayed there for a month.
56. The sponsor stated that once he recovered, he planned to return to Australia as he was now physically and mental able. He called a cousin, asked him to forgive him and asked for his passport and phone so he could return to Australia. Once he convinced them he got his passport back and he returned to Australia. When he returned, he decided not to return to his spouse as the relationship was not good and his family had taken his spouse's side so he decided to move to the Central Coast.
57. The sponsor stated he left his job in Sydney before he went to Nepal and after a week on the Central Coast he got a job. The sponsor stayed one night in Sydney with a friend and then moved to stay in Woy Woy with another friend.
58. At the hearing the sponsor stated that he proposed to the applicant in Pokhara a week before he returned to Australia. The sponsor stated that he told the applicant about his first spouse when they were in Pokhara. He told her they were not in a healthy

relationship for the last 2 years. The sponsor confirmed that he told the applicant about his former spouse before he proposed.

59. After Pokhara he travel straight to Kathmandu to leave for Australia. Once he was in Kathmandu his cousin met him and he gave him his passport and phone. His original ticket was for him to return in September 2016 but he returned in August. His cousin arranged to change the date of the flight.
60. The Tribunal asked why he did not report his kidnap to the police and the sponsor stated that he was mentally and physically down and he did not have energy to fight back. The only option was to convince him to get his passport back and never talk to them at all. He also stated that he did not have any documents to get a new passport or money to change his ticket. The cousin apologised but it was too late.
61. The Tribunal referred to anything could have happened to the applicant after he left Nepal as he had not reported what happened to the police.
62. The Tribunal referred to his former spouse not necessarily being involved in his kidnap and the sponsor stated that she rang him once in rehabilitation centre so his former spouse knew about him being taken to the rehab centre. All of his family knew about the plan including his brother who lived in Sydney and now lives in Perth.
63. The sponsor returned to Nepal in 2018. It took him two years to return as he had to find a job and save money before he returned. They kept in touch using WhatsApp, Skype and Viber. The sponsor also stated that he had to lodge and finalise his divorce before he returned.
64. The Tribunal asked if the sponsor's parent knew that they were getting married before he returned in 2018. The sponsor stated that she had told her parents about their relationship, so he started to speak with them over Skype. The applicant had explained everything to her parents and when he returned, he met with them. The Tribunal asked again if the applicant had advised her parents and the sponsor confirmed that they knew that the parties had agreed to marry.
65. When the sponsor returned in 2018, he met with her parents the next day. The parties told them they wanted to marry, and the applicant had already told them about his situation, so they knew about his previous marriage. He was staying at the applicant's family home. They decided to marry at a Hindu temple near the applicant's home. They did not have a big celebration and her mother did not attend as she was ill. There were no legal documents involved in preparing for the marriage, they just booked the temple.
66. The sponsor confirmed that even though they had a ceremony at a temple, the marriage still has to be registered to be legally recognised and he added that this is done after the religious ceremony. The sponsor when he registered his marriage, he only provided the parties citizenship certificates. Nothing is provided from the temple.
67. The Tribunal asked when his former spouse lodged her divorce proceedings in Nepal and the sponsor stated that he is not sure, perhaps in 2019 or 2020. He was not aware as no one spoke to him about it.
68. The sponsor then stated that the form he filed in required him to state whether it was his first or second marriage and he showed them his Australian divorce certificate before the marriage was registered the first time. The Tribunal stated that this is different from what he had stated earlier as he had been asked what documentation he

provided when his was registering his marriage and he stated that he was only required to provide their citizenship certificate. The sponsor stated that he thought the Tribunal wanted to know what documents he had to provide legally.

- 69. The sponsor stated that he went to obtain his marriage certificate in Nepalese he was informed that his Australian divorce was not recognised in Nepal. The Tribunal then discussed with the sponsor that he was not legally married until the second registration of his marriage which was after he had become divorced in Nepal.
- 70. The sponsor stated that he understands that his first certificate not legal when he went to get his second certificate, however, he had to be honest with the Tribunal so he asked that the certificate be uploaded.

71. Hearing – applicant's evidence

- 72. At the hearing the applicant stated she met the sponsor in June 2016 at a friend's birthday party. His friend Pradip and he introduced the sponsor to her. They were not at the same table but in the same hall. She was with 4 to 5 female friends at a table. After they were introduced, they had a short conversation. The Tribunal asked if they spoke again, and the applicant stated that they then connected on Facebook and exchanged numbers. The applicant confirmed that they only spoke once at the party.
- 73. After two to three days, he called her and asked her to go with him for coffee. They went out for the coffee that day. They went to Malewa Café, Bbsaratpur near where she lives. They continued to talk to each other. She was training as a beautician, and he came to where she was being trained and they would talk. He did this for 2 to 3 times a week.
- 74. The applicant stated that afterward he asked her to go to Pokhara and the applicant stated it was 7 days before he flew back to Australia so 15 to 20 days after they met each other. They stayed for 2 days and stayed in a hotel Bagnas for 2 nights in separate rooms. While there they travelled in Pokhara and returned. They did sightseeing and talked to each other. They did not visit relatives. They returned from Pokhara in July 2016.
- 75. The Tribunal asked if he returned to Australia after they returned to Pokhara and the applicant stated no, as he went to a rehab centre. She found this out after he escaped from the rehab and came to her home. The Tribunal asked if she saw the sponsor the day after they returned from Pokhara and after the Tribunal asked the question several times, the applicant stated that she did not see him the next day after they returned from Pokhara. She felt very bad as she wanted to meet him. He was in rehab for 41 days. The Tribunal asked what she thought when he had disappeared for 41 days, and she stated that she wondered why he did not contact her. She tried to contact him, but he was not with his phone.
- 76. After one week at home, the applicant returned to Pokhara to a friend's home. The applicant stated that she was in Pokhara for a month before she found out that he had been in rehab. She found out that he had been in rehab when he spoke to her. The applicant came to her mother and then her mother spoke with her on the phone. Then he spoke with her and that is when he told her about being in rehab.
- 77. At the hearing the Tribunal asked the applicant what they decided to do. The applicant stated she sent her brother, Arkus to get him from Chitwan on his scooter. The applicant remained at her friend's home and the sponsor stayed for 7 to 10 days at her brother's spouse's home. After that he came to Kathmandu and then to Australia. The

Tribunal asked if the sponsor remained at her brother's home the whole time until the sponsor returned to Australia. The applicant stated that she looked after the sponsor at her brother's home. The Tribunal asked if they stayed together while he was in Pokhara, and the applicant repeated that she looked after him there. The Tribunal asked the question again and the applicant stated that she looked after the sponsor at her brother's home and at night she returned to her friend's home.

78. At the hearing the Tribunal asked when the sponsor proposed to her, and she stated before he flew to Australia. It was about one week before he flew to Australia. They told her parents after he returned to Australia. It was about 7 to 10 days after he flew to Australia.
79. At the hearing the Tribunal asked when did the sponsor tell her he was still married, and the applicant stated he told her after he went to Australia. He also told her he had a son at the same time.
80. At the hearing the Tribunal asked why it took him so long to return to Nepal as there is 2 years from when he left in 2016. The sponsor stated that he returned after his divorce. The Tribunal asked twice more if there were other reasons when the sponsor took 2 years to return to Nepal and the applicant eventually stated that there were no other reasons.
81. At the hearing the applicant stated that the sponsor stayed at her home when he returned in 2018. They had talked about the marriage when he was in Australia so when he came to Nepal they married after about 2 days. They married in a temple. The Tribunal asked if there was anything she needed to do including legal requirements to marry at the temple. The applicant sort clarification and the Tribunal asked if she had to fill in documents and pay a fee and the applicant stated that they got married and afterwards they registered their marriage to get their certificate.
82. The Tribunal asked what forms had to be completed to get a marriage certificate. The applicant stated that they submitted the divorce certificate and then they were given a marriage certificate. The Tribunal asked if there were any other documents that were provided, and the applicant stated that was all.
83. The Tribunal asked why she did not invite her friends to her wedding. The applicant stated that only her family attended the marriage, her father. Her mother did not attend as she was not well. As the sponsor was in a rehab centre, they decided not to invite anyone. The Tribunal referred to his brother and the friend who helped them in Pokhara and the applicant stated no. After the marriage they stayed at home and did not go anywhere.
84. The Tribunal asked the applicant what forms had to be completed and what documents had to be provided of the applicant to obtain the second marriage certificate. The applicant stated that a form had to be completed and citizenship certificates as well the sponsor's divorce certificate had to be provided.
85. **Divorce Certificates and Marriage Certificates**
86. **s.375A Certificate**
87. Provided to the Department was a Marriage Certificate dated 19 July 2018 which states that the parties were married on 1 July 2018 according to office record. The certificate was signed by Prem Prasad Sharma for the Ward Chairman. This certificate was also provided to the Tribunal.

88. Also provided to the Department was a Relationship Certificate for the relationships with the applicant that are official recognised. The relationships included the applicant, her spouse, her parents and her brother. The document was also signed by Prem Prasad Sharma for the Ward Chairman. This certificate was also provided to the Tribunal.
89. On 1 November 2023, the Tribunal wrote to the sponsor advising that on the Departmental file is internal Departmental correspondence which the Department has notified the Tribunal that a certificate under s.375A of the Act applies as the correspondence may reveal Departmental methodology that is covert, sensitive, and not obvious or not a matter of public knowledge. The Tribunal provided a copy of the non-disclosure certificate and invited the sponsor to provide comments on or submissions about the validity of the non-disclosure certificate.
90. On 8 November 2023, the sponsor provided a statement and supporting documents and a representative's submission. Also provided were statements from the applicant's parents and Ms Sita Gurung which are detailed elsewhere in this decision.
91. The sponsor stated in statement from the sponsor as follows:
- He is not sure about what has been recorded on the Department file but will comment on what he feels in doubt about.
 - He married his current spouse on 1 July 2018 and a marriage certificate was issued in English only by the government office in Nepal.
 - In January 2021 he visited the applicant in Nepal and went back to the government office to issue their marriage certificate in Nepalese as they needed it for local official purposes.
 - He found out on that day that his former spouse had filed for divorce a few years earlier and claimed property from his family so the government office advised that they would not be able to issue a marriage certificate in Nepalese with the same date as the marriage certificate in English as the divorce proceedings issued by his former spouse were finalised on 28 February 2021. The officer suggested that a new marriage certificate be issued on the date of the divorce.
 - He had to issue a new marriage certificate otherwise he could not establish that they were married officially. They had to change the marriage date to after the divorce date in Nepal by local government law.
92. Provided to the Tribunal was a Marriage Registration Certificate dated 18 March 2022 stating that the parties were married on 27 June 2021.
93. Provided to the Tribunal on 8 November 2023, in relation to the sponsor's first marriage, were two divorce certificates as follows:
- A Divorce Order dated 28 April 2018 issued by the Federal Circuit Court of Australia.

- A Divorce Registration Certificate in both Nepalese and English which states that the divorce date was 28 February 2021, and the registration of the divorce was 15 March 2022.
94. The Tribunal gave the sponsor an opportunity to comment on the validity of the s.375A certificate when the Tribunal wrote to the applicant on 1 November 2023.
 95. The Tribunal is satisfied that the s.375A certificate is on its face valid, and that the applicant has provided comments and information in relation to the information covered by the certificate.

Whether the parties are in a spouse or de facto relationship

96. Clause 309.211(2) requires that, at the time the visa application was made, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. With limited exceptions that only apply in relation to a decision to grant or not grant a Subclass 309 visa made on or after 20 August 2022, the visa applicant must continue to be the spouse or de facto partner at the time of the Tribunal's decision: cl 309.221. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian permanent resident.
97. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) is effectively a question which must be answered: *He v MIBP* [2017] FCAFC 206.
98. The Tribunal will firstly consider if the parties are married to each other under a marriage that is valid for the purposes of the Act: s 5F(2)(a).

Are the parties validly married?

99. The parties married in a religious ceremony on 1 July 2018, however, when the parties went to register that marriage in January 2021, the parties could not register their marriage because the divorce proceedings commenced by the sponsor's former spouse in Nepal had not been finalised until 28 February 2021 which was more than 2.5 years after the date of their marriage. Further, the sponsor admitted that he was informed when he was registering his marriage that an Australian divorce was not recognised in Nepal. Therefore, as the parties held their religious ceremony in Nepal before the divorce from his first spouse was finalised, the Tribunal is not satisfied that at the time of the application and at the time of this decision, that the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Were the parties in a de facto relationship at the time of the application and are they in a spouse relationship?

100. As the visa applicant and review applicant were not married to each other under a marriage that is valid for the purposes of the Act at the time of the application, they cannot satisfy an essential requirement of a married relationship, but may meet the criteria on the basis of being in a de facto relationship as defined in s 5CB of the Act. A person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s 5CB(2).
101. In forming an opinion whether they are in a de facto relationship, as with a spousal relationship, consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in reg 1.09A(3) which is attached to this decision. Each of the specific matters contained in reg 1.09A(3) is effectively a question which must be answered: *He v MIBP* [2017] FCAFC 206.
102. **Financial aspects**
103. **Evidence provided to the Department**
104. The visa application stated in relation to 'Give details of the financial aspects of the relationship' that 'documents attached later on'.
105. Provided was a letter dated 7 December 2018 from ANZ Smart Choice Super indicating that the applicant had recently been included as a non-lapsing beneficiary under the sponsor's superannuation. The letter was also provided to the Tribunal.
106. **Evidence provided to the Tribunal**
107. Provided to the Tribunal were the applicant's bank statements for his Westpac Choice account from 4 September 2020 to 6 September 2021. Included in the statement are 20 withdrawals in differing amounts from \$1,110 to \$4,610. The withdrawals are labelled as being paid to various names including: Miracle Fast Sewa Isha Nepal Tosil; Hamro Fast Isha Nepal; Fast Servi Isha Nepal; Sunrise Imp and Exp Pty Lt Isha Nepal; and Sun Develo Isha Nepal. There is nothing to indicate that the withdrawals are for monies that are being sent overseas.
108. The sponsor stated in his relationship statement that even though the applicant is working casually he sends her some money from time to time. He also stated that the applicant's family own a shop where they sell kitchenware items and bikes.
109. The applicant stated in her relationship statement as follows:
- The sponsor supports her and her family financially. He sends her money from time to time to her bank account sometimes fortnightly and sometimes monthly.
 - He works full time on the Central Coast where he wants to stay and they will find a job for her. They will both work to pay their bills and living expenses.

- She works on a casual basis doing makeup for wedding and party on basis by appointment.

110. Hearing – sponsor’s evidence

111. The sponsor stated that the applicant works, and he transfers as much as he can from time to time. It varies currently he does daily but other times it been weekly or monthly. On a weekly basis is it is around \$1000 which is about NPR87,000. He used to transfer through, Miracle remit by transferring from his account to their account. Once they have received the money into their account they remit to the applicant’s account in 1 to 3 days. Currently he transfers from his account through Remitely and the applicant receives the money within half an hour.
112. The Tribunal referred to different names as the label for the transfers to the applicant. The sponsor stated that the previous remittance agency used various people to deposit money into the applicant’s account. This is why he stopped using this agency.

113. Hearing – applicant’s evidence

114. The applicant stated that the sponsor provided financial support to her account. It came directly into her account but when he sent it from Australia varied. Sometimes he sent it every two weeks and sometimes every month. How much he sends depends on his income, \$2,000 to \$3,000.

115. Evidence provided after the hearing

116. The Tribunal was provided with the bank statements for various bank accounts as follows:
- The applicant and her fathers’ Bank of Kathmandu accounts for the years of 2017 and 2018.
 - The sponsor’s Westpac Choice account for the period 6 September 2016 to 6 September 2018.
 - The sponsor’s Westpac eSaver account for the period 6 September 2016 to 6 September 2018.
117. Also provided was an explanation of the financial evidence referred to above. The explanation stated that money transferred during the period 28 February 2017 to 9 August 2018 were transferred from the sponsor’s Westpac Choice account to the applicant’s father’s account. The last amount transferred in this period was on 9 August 2018 and was transferred into the applicant’s new account. A list of the transfers out of the applicant’s account and the corresponding deposits into the applicant’s father’s account and her account was provided. The provided financial information support the explanation.
118. The Tribunal has evidence of continuing and regular financial support being provided to the applicant by the sponsor from at least 28 February 2017 which is strong evidence of an ongoing relationship and the places significant weight on this evidence. The applicant is also the sponsor’s beneficiary under his superannuation. Therefore, the Tribunal is satisfied that the financial aspect of their relationship is consistent with a genuine and ongoing de facto relationship.

119. Nature of the Household

120. Evidence provided to the Department

121. The visa application stated in relation to 'Give details of the nature of the household' that 'documents attached later on'. As referred to above the Department was provided with travel documents for the applicant's trip to Nepal in 2018.

122. Evidence provided to the Tribunal

123. The sponsor has travelled outside Australia as follows: 29 May 2016 to 21 August 2016; 26 June 2018 to 25 July 2018; 19 October 2019 to 11 November 2019; 24 January 2022 to 20 April 2022; and 6 November 2023 to 28 December 2023.
124. The Tribunal was provided with travel documents for the applicant's trips to Nepal in 2019, 2022 and 2023.
125. The sponsor stated in his relationship statement that when the applicant cooked, he would help by washing the vegetables and meat, cutting onion, chilli and whatever was needed. He gave her some ideas about cooking, and he is a chef, including how to cook Australian meals including pizza, burgers and pasta. He helped with washing the dishes.
126. The sponsor also stated in his relationship statement that when the applicant is in Australia, they will share the household chores. While the applicant is busy cooking, he will do the house cleaning and washing.
127. The applicant stated in her relationship statement that when the sponsor is in Nepal, they did the household chores together and he is always with her even in the kitchen. If she cooks, he will help cutting and preparation. He helps wash the dishes. The sponsor helps with the vacuuming and changing the bed linen and putting clothes in the washing machine. She loves to cook with the applicant who has taught her how to make Pizza and burgers when he was in Nepal.

128. Hearing – sponsor's evidence

129. The applicant confirmed in 2016 he rented a house in Pokhara for a month with the applicant. All other times he stayed in the family home. Generally, they do not go out and he spends the time with her family in their home. He prepares food, washes dishes, vacuuming. He also taught her how to cook other items.

130. Hearing – applicant's evidence

131. At the hearing the applicant stated that he returned in 2019, 2022 and 2023. When they are together, they did the cooking, cleaning and washing together. When she cooked, he would cut the vegetables. When she vacuumed, he would do something else.
132. The parties have not lived together since their marriage in July 2016, however, the accounts of how they shared domestic chores when the sponsor is in Nepal is consistent. Although the evidence in relations to this aspect is not as strong as others, the Tribunal is satisfied that the nature of the party's household is consistent with a genuine and ongoing de facto relationship in light of their not residing in different countries.

133. Social aspects

134. Evidence provided to the Department

135. The visa application stated in relation to 'Give details of the social aspects of the relationship' that 'documents attached later on'.
136. Provided to the Department were the following form 888 statutory declarations in support of the relationship:
- Mr Kayleb Greer statutory declaration dated 29 November 2018 in which he stated that he has known the parties for 18 months as he has worked with the sponsor during that time and the parties, and he have become great friends. The sponsor and he Skype the applicant over breaks and after work. He believes the relationship is serious and genuine as the sponsor dedicates every spare moment of his day to talk with the applicant. The sponsor has also recently been on holiday to visit the applicant and her family. The sponsor is teaching him Nepalese so he can surprise the applicant next time they chat.
 - Mr Corey Greer statutory declaration dated 29 November 2018 in which he stated that he has known the parties for 2 years. He was first introduced to the applicant by the sponsor as his girlfriend and then as his spouse. He sees the sponsor at work and outside of work and he talks with the applicant weekly over the phone. He believes that the relationship is genuine and loving as the sponsor has returned to Nepal to see the applicant and during the recent trip, he married the applicant. The sponsor is always on the phone to the applicant any chance he gets and regularly updates him on what the applicant has been up to.
 - Anna Horsley statutory declaration dated 29 November 2018, in which she stated that she has known the parties for 2 years as the sponsor started to work in her restaurant 2 years ago and he talks about the applicant all the time over the 60 hours a week they work together. She knew her to be his girlfriend and then after the sponsor's recent trip to Nepal she became his spouse.
 - Mr Joe Stephenson statutory declaration dated 5 December 2018, in which he stated that he has known the parties for one year as he works with the sponsor, mix socially outside of work and speak over the phone. He believes that the parties' relationship is genuine and continuing as the sponsor contacts the applicant every chance he gets by phone or video messaging. Also, the way he speaks of the applicant comes off as being very genuine and loving.
137. The Tribunal was provided with photographs of the parties together and with friends during the 2016 visit to Nepal by the sponsor. The representative submitted in a submission providing information requested at the hearing (the representative submission) stated that these photographs had been provided with the visa application. The photos are no longer on the Departmental file but the Tribunal accepts that they were provided with the visa application.

138. Evidence provided to the Tribunal

139. Provided to the Tribunal were the following form 888 statutory declarations in support of the relationship:
- Anna Horsley statutory declaration dated 6 September 2019 in which she updated her declaration provided to the Department. Ms Horsley stated that she has known the parties for 2.5 years and also stated as follows:

- During that time she has worked together with the applicant 5 days a week up to 80 hours a week. Their small team regularly socialise together after hours and have formed close friendships.
 - When the sponsor started to work for her in 2016, she noticed he was on his phone before and after work and during his lunch break. The sponsor told her about his girlfriend so Ms Horsley has known of the applicant since 2016. She regularly says hi to the applicant when the sponsor is skyping her on his breaks.
 - In 2018 the applicant asked for time off so he could return to Nepal to see the applicant. When he returned he surprised her with the news that he had married and showed them photos of the ceremony in a Nepalese temple and other photos of the parties together.
 - In December 2018 he submitted a tourist visa application for the applicant and was disappointed when it was refused.
 - When the partner application was refused the sponsor was very upset at work and the staff were sad for him. He showed her the rejection letter.
 - She believes that they care and love each other as they make great efforts to stay in contact.
 - She has gotten to know the sponsor and how he is estranged from his family. She is aware that the applicant is supportive of the sponsor through some difficult times, and he send money to support her.
- Ms Paris Thorpe statutory declaration dated 28 August 2019 in which she stated that she has known the parties for 1.5 years from when the sponsor started to share a house with her mother as her flatmate. She has gotten to know him very well as she talks to him every time she is at her mother's place. Ms Thorpe also stated as follows:
 - She has gotten to know the applicant as he is always speaking with her on his phone.
 - They met her in person when she visited Nepal from 12 May to 9 June 2019. They met at Chuchepati, Kathmandu on 28 May 2019. The applicant brought with her, her father and a friend. She spent an hour together in a café and then she went shopping with the applicant. The applicant bought presents for the sponsor which Ms Thorpe took back with her. After a few hours the applicant returned to Chitwan as it was a long drive.
 - She stays in touch with the applicant.
 - Ms Thorpe believes the parties are in a genuine relationship as they are legally married and as she has spent time with them each, she can see they truly care and love each other. The sponsor's name is tattooed on the applicant's hand and his name on her necklace.

- She has found the sponsor to be an honest person and the applicant is very upset about the visa processing. It has been an emotional and trying time for them both.
- Nine photos were provided of their meeting.

140. Subsequently additional statements in support of the parties' relationship were provided as follows:

- The applicant's parents dated 22 August 2019, in which they confirmed much of what was said in the relationship statements. They also stated that they are in contact with the sponsor every day and having spent over three years in regular contact they can see how much the parties want each other in their lives.
- Ms Sita Gurung statement dated 22 August 2019, she is the applicant's cousin sister and close neighbour and she stated as follows;
 - The applicant and her would meet each other and each other's family at their respective homes. She saw a photo of the sponsor on the wall of the room and asked her who he was and the applicant told her about the sponsor and her relationship.
 - She met the sponsor in July 2018 when he was staying at the applicant's home. She was surprised to hear that they were married to each other and the applicant explained that they did not invite relatives or friends due to family matters.
 - She was shown the wedding photos and the sponsor lived in her family home until he returned to Australia.
 - Have socialised with the applicant for over three years and met the sponsor she can see that they truly love and care for each other.

141. The applicant stated in her relationship statement that after they were married the sponsor would sit and watch television with her parents. The sponsor added in his relationship statement that they watched the FIFA World Cup.

142. The sponsor stated in his relationship stated as follows:

- He has introduced over the phone some of his friends in the Central Coast to the applicant including Corey, Kyleb, Anna, Joe, Deklan and Paris, his housemate's daughter.
- He has known Paris for 1.5 years since he started to live at his current address. Paris met the applicant in Kathmandu and bought back to him a parcel from the applicant.
- The sponsor has chatted on WhatsApp and Viber with the applicant's brother who has lived in Dubai for 10 years.

143. The applicant stated in the relationship statement as follows:

- She has been introduced over the phone to the sponsor's friends including Kayleb, Anna, Deklan Corey and Joe. She has not spoken with them a lot and has only done so just to say hi.
- She knows a little about the sponsor's flatmate Jacqui and she sometimes says hi to her on the sponsor's phone. Jacqui's daughter Paris met with the applicant when she was in Nepal. The applicant sent with Paris a parcel to the sponsor.
- Once she is in Australia she would like to go to the gym with the applicant and go to the movies and shopping.
- During the sponsor's last visit at her family home, they met her father's sister, Sita Gurung. She spoke with the sponsor sometimes over Skype when the applicant was speaking with him.
- She has not met any of the applicant's family as she does not have any need to meet them due to their cruel behaviour towards the sponsor

144. Hearing – sponsor's evidence

145. During the last trip a friend, Suraj also travelled to Nepal, and he met with the applicant when they both went to his home.

146. Hearing – applicant's evidence

147. The Tribunal asked if she had any photos and the applicant stated that she did not. The Tribunal asked if she had any photos of the time they spent in Pokhara and the applicant stated that she has one or two. The Tribunal asked to be provided with more photos.

148. Evidence provided after the hearing

149. After the hearing, additional statements in support of the parties' relationship were provided as follows:
- Mr Pravesh Shrestha, statutory declaration dated 22 January 2024 in which he states that he has known the parties for 3.5 years. He also stated that he met the sponsor in 2020 at the Margarita Daze and since then they have become good friends. They hang out together and the sponsor always talks about the applicant. Mr Shrestha notices that the sponsor is always on his phone speaking with the applicant, and he has also spoken to the applicant. Mr Shrestha also stated that he has seen the wedding photos, he has always noticed them speaking on the phone or by video chat, he has spoken with their parents, and they send each other gifts.
 - Mr Suraj Chaudhary, a statement dated 19 January 2024 in which he stated as follows:
 - He has known the sponsor for 3.5 years from when he started to work at the Margarita Daze in August 2020 and he has got to know the sponsor well as they work together 5 days a week. They are not currently working together but they hang out at least 2 to 3 times a week.

- Whenever they are working together or hanging out the sponsor mentions the applicant. He has noticed the sponsor is always speaking with her.
 - He travelled to Nepal from November to December 2023 and met the applicant when he and his spouse and the parties went out to dinner in Daang, Nepal. They all also visited local places in Daang and the parties met his father and mother-in-law at their home.
 - They all returned to Chitwan where Mr Chaudhry and his spouse stay for a day at the applicant's home. He met the applicant's parents and visited local places in Chitwan. They also visited Sauraha Chitwan and stayed overnight.
 - After meeting the applicant and her parents he can tell the parties love each other. The way the sponsor treated the applicant, and her family showed him that the applicant cares about the applicant and her family.
 - The sponsor respects the applicant's parents as his own parents.
150. Photos were provided to the Tribunal taken during the sponsor's trip to Nepal in November and December 2023 including photos of the parties with Mr Chaudhry and his spouse.
151. The supporting statutory declarations from family and friends is strong evidence that the parties' relationship is recognised by family and friends. Even though the parties reside in different countries two friends of the sponsor has visited the applicant in Nepal. Therefore, the Tribunal is satisfied that the social aspect of the relationship is consistent and with a genuine and ongoing de facto relationship with the applicants in light of the applicants not residing in different countries.
152. **Nature of persons' commitment to each other**
153. **Evidence provided to the Department**
154. The visa application stated in relation to 'Give details of the nature of the commitment the applicant and sponsor have for each other' that 'documents attached later on'.
155. Provided to the Department was for the period a list of calls incoming, outgoing and missed, and messages some of which include text but most of the messages have been deleted. The identity of the person who owns the account is not clear and the receiver of the calls and messages is only identified as 'Budi'. There was one call from Budi on 20 August 2018, three outgoing calls on 28 September 2018, over 20 pages of calls and messages on 4 December 2021; 18 calls and messages on 5 December 2018; 31 on 6 December 2018 and only one call on 7 December 2018.
156. **Evidence provided to the Tribunal**
157. Provided was what was described as a selection of calls from November 2021 to show that the parties talk every single day. There are a number of screenshots from the applicant's WhatsApp account during November which, unfortunately, does not show who the applicant is calling or receiving calls from.
158. After the hearing the Tribunal was provided with some information form TikTok which it unfortunately could not open.

159. The applicant stated in her relationship statement as follows:

- There is not a single day that they do not see each other or talk over video chat. They don't do a lot of chatting as they prefer to talk on the phone.
- They do not use Facebook as they have made a commitment to each other that they will start to use a combined Facebook once they are living in Australia.
- The applicant wants to study a bachelor of beauty when she comes to Australia.
- The sponsor has applied five times for the applicant to be granted a visa for Australia. She was sad and mentally distracted when she did not get the visas but she is lucky to have a loving and caring spouse.

160. Hearing – sponsor's evidence

161. The sponsor stated that his plans for the future is to open his own business. He has been financially down and he has to look after everything. The applicant is also interested in opening a business as she is skilled as a beautician and nail technician. They may open a shop or café and the applicant is also interested in cooking. They have been talking about a family and they decided to wait until they are in the same country before they have a baby.

162. Hearing – applicant's evidence

163. The Tribunal asked what he plans were for the future and the applicant stated that she wants to meet him as it's been 4 years. She is a beautician, and she plans to open her own business there. They have waited 4 years and they are genuine.

164. The applicant accepts that the parties are in regular contact in light of the statements provided in support of the relationship particularly those from the sponsor's work colleagues. The Tribunal is satisfied that the parties draw a lot of support from each other. Therefore, on the evidence the Tribunal is satisfied that the nature of the parties' commitment to each other of the relationship is consistent with a genuine and ongoing de facto relationship.

165. At the time of the application and this decision, on the above evidence in particular the evidence relation to the review applicant's continuous financial support and communication, the Tribunal is satisfied that they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis. The Tribunal is also satisfied that they are not related to each other.

166. On the basis of the above the Tribunal is satisfied that the requirements of s 5CB(2) are met at the time the visa application was made and the time of this decision.

167. Therefore, the visa applicant meets cl 309.211 and cl 309.221.

Are the additional criteria for a de facto relationship met?

168. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in reg 2.03A. Both members of the couple must be at least 18 years

old: reg 2.03A(2). In this case, at the time of application, the applicant and the sponsor were at least 18 years old.

169. The applicant must have been in the de facto relationship for at least the 12 month period ending immediately before the date of the application: reg 2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.
170. There is no evidence that the relationship is registered under a relevant State or Territory law or that the sponsor held, holds or is applying for a permanent humanitarian visa, so they must meet the 12 month requirement.
171. The parties' religious ceremony held on 1 July 2018 is strong evidence that they were in a de facto relationship at that time. However, as the visa application was lodged on 17 December 2018, the parties needed to be in a relationship from at least 11 February 2017 to meet the 12 month requirement. There is number of differences in what the parties stated in their genuine relationship statements and what was stated at the hearing, particularly in relation to when they told the applicant's parents about their intention to marry and when the sponsor informed the applicant and her parents about his former spouse and his child. However, the sponsor did start to financially support the applicant from February 2017. Further, the supporting statements from Mr K Greer, Mr C Greer, Ms Horsley dated in November 2018 state that they have known the parties for at least 18 months even though they had only met the applicant through the sponsor talking about her and occasionally speaking with the applicant on the sponsor's phone. Ms Horsley provided an additional supporting statement dated 6 September 2019 in which she relevantly stated that the sponsor started to work for her in 2016 and she noticed that during his breaks and before and after work he was always on his phone. The sponsor told him about his girlfriend, the application and she has known about the applicant since 2016. Therefore, the Tribunal is satisfied that the parties despite not residing in the same country, were in a de facto relationship at the earliest for some time after the sponsor arrived back into Australia from Nepal on 21 August 2016 and by latest in February 2017 when he started to support the applicant financially.
172. Accordingly, the Tribunal is satisfied that the applicant had been in the de facto relationship for at least the 12 month period ending immediately before the date of the application.
173. For these reasons the Tribunal is satisfied that the visa applicant meets the additional criteria prescribed in reg 2.03A.
174. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

175. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
 - cl 309.211(2) of Schedule 2 to the Regulations

- cl 309.221(2) of Schedule 2 to the Regulations; and
- reg 2.03A

Namoi Dougall
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;
- the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).